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Nos. 82-34 and 82-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN PAPER INSTITUTE, INC.,
Petitioner,
—v.—
AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
—v.—
AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER AMERICAN PAPER INSTITUTE, INC.

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE AVOIDED COSTS RULE COMPLIES WITH THE STATUTE	2
II. THE INTERCONNECTION RULE IS LAWFUL	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases PAGE

Camp v. *Pitts*, 411 U.S. 138 (1973) 6

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U.S. 515 (1945) 14

FERC v. *Mississippi*, _____ U.S. _____, 102 S. Ct. 2126 (June 1, 1982) 2, 11, 16

FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) ... 4

FPC v. *Memphis Light, Gas & Water Div.*, 411 U.S. 458 (1973) 4

Statutes and Regulations

Public Utility Regulatory Policies Act, P.L. 95-617, 92 Stat. 3117, *et seq.* 1

Section 210, 16 U.S.C. § 824a-3 .....*passim*

Energy Tax Act of 1978, P.L. 95-618, 92 Stat. 3174, *et seq.* 1

National Energy Conservation Policy Act, P.L. 95-619, 92 Stat. 3206, *et seq.* 1

Powerplant and Industrial Fuel Use Act of 1978, P.L. 95-620, 92 Stat. 3289, *et seq.* 1

Natural Gas Policy Act of 1978, P.L. 95-621, 92 Stat. 3351, *et seq.* 1

Federal Power Act, 16 U.S.C. § 792, *et seq.*:

Section 201(b), 16 U.S.C. § 824(b) 14

Section 210, 16 U.S.C. § 824i.....13, 14, 16

Section 211, 16 U.S.C. § 824j..... 14

Section 212, 16 U.S.C. § 824k 14

PAGE

18 C.F.R. Part 292:

Section 292.101(b)(6) 7

Section 292.304(d) 7

Section 292.304(e)(2)(i) 8

Section 292.304(e)(2)(iii) 10

Section 292.304(e)(2)(vi) 12

Section 292.308 17

Section 292.403 11

Miscellaneous Materials

California Public Utilities Commission Decision No. 91107, December 19, 1979, 34 PUR 4th 1, 114 12

Decision and Order of Maine Public Utilities Commission Docket Nos. 81-127, 81-206, March 27, 1982 ... 12

H.R. Rep. 95-1750, 95th Cong., 2d Sess. (1978) 3, 6

Idaho Public Utilities Commission Order No. 17796, December 30, 1982 12

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ARGUMENT

The Public Utility Regulatory Policies Act of 1978 was only one part of a package of legislation signed into law on November 9, 1978, designed to combat a nationwide energy crisis.[1] PURPA itself had six separate titles.[2] Two of them,

1 In addition to PURPA, the package included the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351.

2 Title I—Retail Regulatory Policies for Electric Utilities; Title II—Certain Federal Energy Regulatory Commission and Department of

Titles I and III, relate to regulatory policies for electric and gas utilities and seek to create immediate benefits for consumers.[3] Section 210 of Title II, on the other hand, had a different emphasis. It clearly set forth Congressional intention that FERC was, by rule, to encourage alternative energy sources. In Section 210(a) it directed that within one year FERC "shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production." The Court of Appeals below, respondents, and their *amicus curiae* Edison Electric Institute ("EEI") have lost sight of this unequivocal expression of Congressional intention. Accordingly, this reply brief is submitted by API to address certain misconceptions of respondents and EEI reflected in their briefs to this Court.

I.

THE AVOIDED COSTS RULE COMPLIES WITH THE STATUTE

a. Respondents' basic argument is that the Congressional direction contained in PURPA Section 210(a)—that FERC's rules should encourage cogeneration and small power production—must be subordinated in FERC's rules to the short-term interests of utility ratepayers. Specifically, they argue that the possibility that utility ratepayers might obtain immediate rate benefits from the program—regardless of how insignificant[4]—

Energy Authorities; Title III—Retail Policies for Natural Gas Utilities; Title IV—Small Hydroelectric Power Projects; Title V—Crude Oil Transportation Systems; and Title VI—Miscellaneous Provisions.

3 As this Court observed in *FERC* v. *Mississippi*, ____ U.S. ____, 102 S. Ct. 2126, 2130 (June 1, 1982):

> "The Titles share three goals: (1) to encourage 'conservation of energy supplied by . . . utilities;' (2) to encourage 'the optimization of the efficiency of use of facilities and resources' by utilities; and (3) to encourage 'equitable rates . . . to consumers.' "

4 Respondents and EEI chastise the Commission for saying that rate reductions will be insignificant for any individual customer, and respondents suggest that an 80% avoided costs purchase rate could save consumers vast sums. (Res. Br., p. 16 n.14; EEI Br., p. 21.) The

must be read into PURPA Section 210 even though no such requirement is stated. Instead, they urge that the just and reasonable language contained in Section 210(b) effectively overrides all other provisions in Section 210. They do so by arguing that the phrase "just and reasonable" has a "well understood rate-related meaning," and this requires FERC to set a purchase rate under PURPA that will assure ratepayers immediate rate benefits from the program. (Res. Br., p. 20.) They are wrong.

The conference report accompanying PURPA made it clear that, when dealing with purchase rates, the just and reasonable language in PURPA Section 210(b) did not have the traditional rate-related meaning. Thus, it was not to be construed to require the purchase rate from qualifying facilities be subject "to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power." H.R. Rep. No. 95-1750, 95th Cong., 2d Sess., p. 97 (1978). By contrast, PURPA Section 210(c), dealing with sales rates to qualifying facilities, also contained the just and reasonable language. The committee report clearly differentiated between the two sections stating "[h]ere the phrase 'just and reasonable' is intended to refer to traditional utility ratemaking concepts. The conferees do not intend that the cogenerator or small power producer pay any more or any less than is otherwise just and reasonable in terms of the utility receiving the reasonable rate of return for providing service to those kinds of users." *Id.* at 98.

Respondents are therefore wrong when they suggest that the just and reasonable language of Section 210(b) requires the

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fallacy in this suggestion is that the Nation's supply of electricity will not be increased by alternative energy sources if the purchase rate is too low. As we discussed in our principal brief (pp. 20-22), absent a high enough purchase rate, qualifying facilities simply will not be built. The estimate of "massive potential for cogeneration and small power production" (Res. Br., p. 16) is based upon a purchase rate which encourages them precisely as Congress said FERC's rules should.

same type of analysis as with a utility's rates to its customers. FERC was not obligated to apply a similar ratemaking analysis in establishing the purchase rate for sales by PURPA-induced cogenerators and small power producers.

Even a traditional ratemaking analysis would not require FERC to establish a purchase rate which provides immediate short-term rate benefits to utility ratepayers. In *FPC* v. *Memphis Light, Gas & Water Div.*, 411 U.S. 458, 465-66 (1973), this Court considered the just and reasonable standard under the Natural Gas Act and quoted from *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944):

> "In the early case of *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, we emphasized two aspects of the power of the Commission to fix 'just and reasonable' rates under 15 U.S.C. § 717. First, was the desire 'to protect consumers against exploitation,' 320 U.S., at 610, and second, was the aim to promote the 'financial integrity' of the natural gas companies as measured, not only by revenues sufficient to recover operating expenses and capital costs, *id.*, at 603, but also by revenues 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.' *Ibid.*"

Indeed, this Court reversed the Court of Appeals for the District of Columbia Circuit "*in toto*," because:

> "Its holding that the consumer interests were not furthered by the Commission's action is short of the application of the appropriate standard for review. As already noted, under *Hope Natural Gas* rates are 'just and reasonable' only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong." 411 U.S. at 474.

Here, of course, FERC protected the interests of utility ratepayers while at the same time encouraging new alternative energy projects. It said that "utilities' customers are kept whole, and pay the same rates as they would have paid had the utility not purchased energy and capacity from the qualifying

facility." B-65. FERC was not required to "further" the ratepayers' interests even under the traditional rate-related meaning.

b. Respondents and EEI compress the provisions in PURPA Section 210(b) that rates be just and reasonable to the electric consumers of the utility, in the public interest and non-discriminatory against qualifying facilities as though the only consideration was the "just and reasonable" one. (Res. Br., pp. 13, 20, 21, 22; EEI Br., pp. 19, 20, 21, 22, 23, 25, 26, 29, 30.) Respondents then argue that the Commission did not consider whether a rate which would satisfy their definition of the statutory criteria could be established. (Res. Br., p. 13.) Respondents are mistaken.

In the Staff Discussion Paper issued by FERC in July 1979, JA 6, the Staff noted that "so long as the service being offered by" the qualifying facility "is fully comparable to the alternative, the payment to the cogenerator of the full cost of the alternative would be just and reasonable to the utility's customers." JA 30, n.11. However, the Commission invited the utilities to suggest some other rate, stating:

> "Thus we have difficulty in describing some particular price other than the avoided cost as being just and reasonable to the utility's customers." *Id.*

Respondents now criticize FERC for failing "to examine carefully the possibility of adopting a purchase rate rule that set rates *below* the statutory maximum of full avoided cost." (Res. Br., p. 25; emphasis in original.) But the utilities failed to make even a minimal effort during the rulemaking proceedings to furnish a rational basis for establishing a purchase rate at less than avoided costs, yet still comply with Congress' direction that FERC's rules should "encourage cogeneration and small power production."[5] As the Commission Staff observed,

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5 The Court of Appeals panel acknowledged this failure by the utilities when it directed that on remand the utilities be given the opportunity to "demonstrate" that a "percentage of avoided costs approach" might

"[w]e do *not* understand the prescription that the proper price is the lower of the just and reasonable price and the avoided cost as requiring that the selling [qualifying facility] be restricted to a minimal mark-up from its marginal generation cost on its sales to a utility."[6] JA 30, n.11; emphasis in original.

In this light, the Commission's explanation in its Order of its reasons for adopting an avoided costs purchase rate for new facilities offered the reasoned explanation required by the Administrative Procedure Act. Among other things, it said that "purchases of energy or capacity from qualifying facilities will occur only when the cost to the qualifying cogenerator or small power producer of producing the energy or capacity is lower than the utility's avoided costs. Only if this is the case will payment by the utility of its avoided costs provide economic benefit for the cogenerator or small power producer." B-64. This explanation expressed "the determinative reason for the final action taken" as required by *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). Respondents cannot successfully urge that the Court of Appeals was free to set aside that determination because it disagreed with the conclusion.

c. Both respondents' brief and the brief of EEI grossly misapprehend the operation of the purchase rate rule. They assert that under the rule new qualifying facilities will always

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pass muster. B-12. During the rulemaking, however, utilities only urged a "split-the-savings" rate, which would have required a detailed examination of the costs of the qualifying facilities. FERC rejected this approach as contrary to Congressional intention, B-65, and the Court of Appeals agreed, B-11.

6 The conference report recognized that if the program were to succeed, potential producers required financial incentives to justify the risks and expenses entailed in such projects. "The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable." H.R. Rep. 95-1750, *supra*, at pp. 97-98.

receive the full avoided costs of the utility, implying that this invariably means a rate based on the utility's highest cost power. They are wrong on both counts.

As the Commission observed in its Order, there are two distinct elements in a utility's costs. One element, called "energy" costs, is "the variable costs associated with the production of electric energy (kilowatt-hours). They represent the cost of fuel, and some operating and maintenance expenses." B-43, 44. The second element, referred to as "capacity" costs, is "the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities." B-44. The energy costs and the capacity costs together constitute the utility's avoided costs. 18 C.F.R. § 292.101(b)(6); B-43. Under the Commission's rules, however, although utilities are required to offer to purchase energy or capacity from qualifying facilities, the purchase rate initially set[7] at full avoided costs need be paid to newly constructed facilities only if those costs can truly be avoided by the utility.

In calculating avoided costs, the rules provide that, absent agreement between the parties, the calculation is made either at the time the power is delivered or, if the qualifying facility incurs a legally enforceable obligation to deliver power over a specified term, at the time that obligation is incurred. 18 C.F.R. § 292.304(d). Absent a contract, a qualifying facility delivering power throughout the day receives an avoided costs purchase rate calculated at the time of delivery during the day and not just when the utility is operating its highest cost units.

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7 Unlike the Court of Appeals and respondents, the Commission recognized that at the time of the rulemaking extensive experience with alternative energy sources was lacking, and it was difficult to predict with any degree of assurance the specific consequences of any particular rate for purchases from new facilities. "The Commission also continues to believe," it said in the Order, "that this rulemaking represents an effort to evolve concepts in a newly developing area within certain statutory constraints." B-77.

A utility normally operates only its base load units—which are its lowest cost units—during periods of lowest demand, *e.g.*, the late night or early morning hours. During those periods, the utility's avoided costs would be very low, amounting to no more than its energy costs, since the qualifying facility delivering power without a contract is not making available any usable capacity to the utility.[8] Thus, since energy costs are the only costs the utility might avoid when it takes power from a qualifying facility during periods of low loads, it is only those costs which determine the purchase rate under the Commission's rules.

As the day progresses, utilities normally experience a growth in system load as more and more customers begin to use power. Most utilities have sufficient capacity available to meet normal system loads and, therefore, even at higher loads, the qualifying facility delivering power without a contract will not be making capacity available. It will, therefore, be entitled to a purchase rate based only on the energy costs that the utility avoids. At peak loads, some utilities require "peakers," which are higher cost units since they require more expensive fuels to generate power. Under the Commission's rules, a qualifying facility delivering power at that time is entitled to a purchase rate based on the avoided costs of that more expensive fuel.[9]

To illustrate, a utility operating at 2 a.m. may need only its low cost base load unit, the energy cost of which is, say, 2.345¢

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8 The rules provide that although the utility is required to offer to purchase the power, "the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load." B-53.

9 The Commission recognized that the ability of a utility to control power production "enhances a utility's ability to respond to changes in demand, and thereby enhances the value of that power to the utility." B-79. Accordingly, the rules provide that one of the factors to be taken into account in determining avoided costs is the willingness or ability of the qualifying facility to enter into an arrangement allowing the utility to dispatch—control the flow of—the facility's power. 18 C.F.R. § 292.304(e)(2)(i).

per kwh. At 7 a.m., the utility continues operating those same units to meet its system load and, therefore, its avoided costs are still only 2.345¢. By 11 a.m., however, as more demand is put on the system, the utility may be required to turn on its next most expensive units whose energy costs are, say, 3.567¢ per kwh.[10] By early afternoon, when the utility's system is running at peak load, the utility may have to use its peakers at an energy cost of, say, 6.789¢ per kwh. Under the Commission's rules, absent agreement or commitment, the new qualifying facility receives a purchase rate based upon the utility's avoided costs at the time the power is delivered. It is only when the utility is operating its most expensive units that a purchase rate based on those high energy costs is required. By the evening, the utility no longer requires its peakers, and the purchase rate drops back to 3.567¢ for power delivered during that period. By the early morning hours, when the utility only operates its base load units, the qualifying facility delivering power is again entitled to a purchase rate of only 2.345¢.[11]

Many utilities do not rely upon their existing facilities to meet all peak system loads. In some cases, the utility contracts with a second utility to purchase bulk power from the second utility. The FERC rules contemplate that if the utility can avoid making such a contract and, instead, obtain that power from a

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10 As the Commission observed, "[u]nder the principle of economic dispatch, utilities generally turn on last and turn off first their operating units with the highest running cost." B-44.

11 While minute-by-minute detailed calculations can be made, they are not practicable. State regulatory commissions have, therefore, implemented the FERC rules by providing for an average daily and seasonal rate which often reflects less than the utility's actual energy cost. As the Commission observed, "the more precisely the time of purchase is recorded the more exact the calculation of the avoided costs, and thus the rate for purchases, can be. Rather than specifying that exact time-of-day or seasonal rates for purchases are required, however, the Commission believes that the selection of a methodology is best left to the State regulatory authorities . . . charged with the implementation of these provisions." B-78, 79.

qualifying facility, those avoided costs—the costs it will not pay the second utility—be calculated in the purchase rate. B-80.

In other cases, a utility cannot meet its projected load requirements, either from its own facilities or by bulk power arrangements with another utility. In those cases, the utility must consider constructing new facilities. Such facilities take years of planning and construction before they are on-line. The FERC rules contemplate that if the qualifying facility makes available power which will obviate the need for the utility to build a new unit, or will permit the utility to build a smaller, less expensive plant, the qualifying facility is entitled to those avoided costs by including capacity costs in the purchase rate. B-44. Moreover, the rules provide utilities with an incentive to contemplate less expensive expansion plans in order to reduce capacity payments to qualifying facilities. The utilities' ratepayers are the beneficiaries of this lower cost.[12]

Before the utility is required to include a capacity factor in its avoided costs, however, the new qualifying facility must assure the utility that it will have that power available when the utility requires it. As a practical matter, the utility is assured of that power by contractually committing the qualifying facility to have it available in the future. Another factor to be taken into account in determining avoided costs under the rules, therefore, is "[t]he terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for noncompliance." 18 C.F.R. § 292.304(e)(2)(iii). Absent assurances from qualifying facilities that the power will be available, the utility is not able to avoid the costs connected with construct-

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12 The capacity factor is not based upon a utility's grandiose expansion plans, but rather on "the utility's optimal capacity expansion plan," B-45, which FERC defined as "the schedule for the addition of new generating and transmission facilities which, based on an examination of capital, fuel, operating and maintenance costs, will meet a utility's projected load requirements at the lowest total cost." B-45 n.6.

ing a new plant. FERC's rules do not require inclusion of capacity costs in the purchase rate in these circumstances.[13]

In effect, therefore, rather than utilities always paying at the highest cost as respondents suggest, the full avoided costs purchase rate requires maximum payments only if in fact the utility can avoid both energy and capacity costs in reliance upon the power made available by the new qualifying facility.[14] Thus, the rule carries out the Congressional directive to encourage construction of cogeneration and small power production facilities, while at the same time preventing the utilities' ratepayers from paying any more than they would have paid in the absence of such facilities.

We are at a loss to comprehend respondents' assertion (Res. Br., p. 33) that "FERC's rule deprives utility consumers of benefits they would have reaped but for PURPA." It is premised on the non sequitur that absent the encouragement of new facilities by PURPA and the rules, they would have been constructed anyway and utilities would have purchased their power at lower rates. It was precisely because alternative energy sources were being discouraged by utilities that PURPA was enacted. *See FERC* v. *Mississippi*, *supra*, 102 S. Ct. 2126

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13 As we pointed out in our principal brief (pp. 25-29), the operation of the rule encourages utilities and project developers to negotiate arrangements both to assure the utilities that the power will be available and to assure the developers that the project financing will be available based on a predictable price for the power when produced.

14 If the operation of the rules proves to be inappropriate—creating what respondents and EEI categorize as a "windfall" (Res. Br., p. 18; EEI Br., p. 29)—Congress contemplated that they would be revised periodically by FERC. In the interim, the rules authorize state regulatory commissions to apply for exemptions from the avoided costs formula. 18 C.F.R. § 292.403. Experience to date indicates, however, that the rule has operated as intended by Congress. Indeed, EEI notes the increase in filings by potential cogenerators in the last year. (EEI Br., p. 24 n.18.) The only parties objecting to the purchase rate are the utilities and their association. Not a single state regulatory commission nor consumer group has challenged the avoided costs purchase rate.

(June 1, 1982). In fact, many utilities have been less than cooperative before state regulatory commissions seeking to implement the rules.[15] Some commissions have found it necessary to assess penalties against utilities which have refused to deal with cogenerators.[16]

In the long run, the effect of the rule will be to reduce utilities' avoided costs as more qualifying facilities are constructed. If a utility can meet its requirements for power from new qualifying facilities, it need not utilize expensive peakers or purchase bulk power from other utilities, nor need it construct new plants to satisfy future load growth. As more qualifying facilities are constructed, they will furnish more power to the utilities, thereby reducing the utilities' avoided costs and, in turn, reducing the ratepayers' cost.[17] This long-term benefit is in addition to the other economic and environmental benefits contemplated by Congress and described at

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15 *See, e.g.*, Idaho Public Utilities Comm'n Order No. 17796, Dec. 30, 1982, at 12. ("The evidence is overwhelming that Idaho Power has not processed the Koyle [small power sales] application in good faith and that its failure to do so is symptomatic of a broader failure to implement this entire program in good faith.")

16 *See, e.g.*, California Public Utilities Comm'n Decision No. 91107, December 19, 1979, 34 PUR 4th 1, 114. ("[W]e have found PG&E's efforts to promote the development of cogeneration to have been seriously inadequate. Upon this basis we have concluded that PG&E's authorized return on equity for its electric department operations should be reduced by 20 basis points"—which amounted to $7.2 million); *see, also*, Decision and Order of Maine Public Utilities Comm'n Docket Nos. 81-127, 81-206, March 27, 1982, at 15-16. ("If it were not for [Central Maine Power's] practices with respect to cogeneration and conservation, we would allow CMP a rate increase designed to provide it with a reasonable opportunity to earn a return of 15.5% on its common equity. However, for the reasons set forth below . . . we will allow CMP a rate increase designed to provide it with a reasonable opportunity to earn a return of 15.4% on common equity.")

17 The rules contemplate this reduction in avoided costs by requiring that "[t]he individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system" be taken into account in calculating avoided costs. 18 C.F.R. § 292.304(e)(2)(vi).

pages 18-20 in our principal brief and in the brief of *amici curiae* National Resources Defense Council, Inc., National Audubon Society and The Solar Lobby.

In short, by encouraging alternative energy sources, the avoided costs purchase rate rule is just and reasonable to the electric consumers of the electric utility, in the public interest and non-discriminatory to qualifying facilities, precisely as PURPA Section 210(b) required.[18]

II.

THE INTERCONNECTION RULE IS LAWFUL

a. Under Federal Power Act Section 210(a)(1), 16 U.S.C. § 824i(a)(1), "any electric utility, Federal power marketing agency, qualifying cogenerator, or qualifying small power producer," may apply to FERC for an order respecting physical connections in various respects.[19] In response, FERC may issue an order requiring "the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant." 16 U.S.C. § 824i(a)(1)(A).[20]

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18 API members purchase vastly more electricity than they sell and are vitally interested in this program as ratepayers. The utilities, on the other hand, are interested in their own construction programs which will add to their rate base and hence to their return on investment. It is therefore in their economic interest to discourage cogeneration and small power production by assuring that the purchase rate received is too low to encourage their development.

19 The application may also be made by any "State regulatory authority," 16 U.S.C. § 824i(a)(2), and an order may be entered on the Commission's "own motion." 16 U.S.C. § 824i(d). The order may deal with a physical connection which "is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability," 16 U.S.C. § 824i(a)(1)(B), may require "sale or exchange of electric energy or other coordination," *id.* at (C), and may even require an "increase in transmission capacity," *id.* at (D).

20 The order thus may be directed to any cogeneration or small power production facility (whether or not it is a qualifying facility). Under

A qualifying cogenerator or small power producer applying for interconnection with a utility under FPA Section 210, as the Court of Appeals said it must, would be faced with the claim that the connection can only be ordered with the "transmission facilities" of the utility, not its "distribution facilities." The difference between transmission and distribution facilities is an integral part of the Federal Power Act. Indeed, under the Act, there is a jurisdictional distinction between transmission facilities and "facilities used in local distribution." 16 U.S.C. § 824(b).

Respondents and their amicus EEI obfuscate this distinction, asserting that the interconnections at issue here relate to "those necessary to permit cogenerators to *transmit power to* an electric utility." (Res. Br., p. 42; emphasis in original.) Such interconnections, they claim, are therefore with the transmission facilities of the utility. (Res. Br., p. 42; EEI Br., p. 11.) By this logic, the lines over which a utility furnishes electricity to its customers are also transmission facilities. Such lines, however, clearly constitute distribution facilities. As this Court observed in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 529 (1945):

> "Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state."

PURPA Section 210(e)(3)(3), "[n]o qualifying small power production *facility* or qualifying cogeneration *facility* may be exempted" from FPA Sections 210, 211 or 212 (emphasis added). A literal reading of the statutes indicates that the FERC interconnection rule does not "exempt" a qualifying facility since the applicant is not the "facility" but, rather, the "cogenerator" or the "small power producer." Respondents denigrate the target/applicant distinction as an "artificial distinction" (Res. Br., p. 46), yet the statute itself recognizes it. Literally, the cogenerator or small power producer is the applicant, while the facility is the target.

Hence, to interpret "transmission" to be the equivalent of "sending," as respondents do, misreads the statute.[21]

b. Respondents' argument ignores one of the fundamental purposes of PURPA Section 210. Not only were FERC's rules to require utilities to offer to purchase electricity from qualifying facilities, as Section 210(a)(2) mandates, but they were also to require utilities to offer to sell electricity to them, as Section 210(a)(1) directs. Both respondents and EEI acknowledge that in order to effectuate sales, an interconnection is required, and concede that the facilities over which electricity is sold to cogenerators and small power producers are distribution and not transmission facilities. (Res. Br., p. 42; EEI Br., p. 11.)

Under PURPA Section 210(a)(1), a utility must offer to sell to qualifying facilities, and it is common ground that such sales require an interconnection. The Court of Appeals' opinion and respondents' argument require the Court to conclude that Congress provided no mechanism by which the Commission can order a utility to interconnect to permit those sales to take place. This result flows from respondents' argument that FERC cannot order interconnection by rule under PURPA Section 210, but must proceed only under the substantive and procedural requirements of FPA Sections 210 and 212. Those sections, however, provide that FERC can only order interconnection with the transmission facilities of electric utilities, not their distribution facilities. Hence, the argument leads to the conclusion that interconnection for sales by utilities cannot be ordered by FERC under PURPA. Not even the utilities have urged that construction of the statute, however, since it so obviously flies in the face of Congressional intention.

The interconnection over which a utility sells electricity to a qualifying facility is the same interconnection over which a utility purchases electricity from a qualifying facility. There is

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21 The discrete purposes behind the FPA amendments and PURPA Section 210 are discussed in the Commission's principal brief (pp. 36-41) and its reply brief and will not be repeated here.

no need for separate interconnections to be constructed and, in fact, they are not. Unless Congress intended PURPA Section 210(a)(1) to have no meaning at all, the Commission's rules must enable FERC to order a utility to interconnect to make sales to qualifying facilities. That same interconnection permits the qualifying facility to sell power to the utility. It is illogical to assume that Congress granted FERC authority to order interconnections for purposes of sales from utilities to qualifying facilities but withheld such authority for purposes of purchases by utilities from qualifying facilities. Such a dichotomy could not have been intended.[22]

c. Respondents and EEI also attempt to support the Court of Appeals' decision by referring to safety and reliability concerns. (Res. Br., p. 43; EEI Br., pp. 13-15.) Indeed, EEI suggests that the very purpose of proceedings under FPA Sections 210 and 212 is to protect the safety and reliability of the utility's system. (EEI Br., p. 13.) Such concerns are of such great moment, it asserts, that Congress placed the responsibility directly with the Commission. (EEI Br., p. 14.) But, later, EEI suggests that proceedings can be streamlined by the Commission which can "dispense with a hearing when no material facts are in dispute." (EEI Br., p. 16.) If no material facts are in dispute, a utility would have no reason to refuse to interconnect with a qualifying facility other than to create the obstacles and impediments to the program which Congress sought to avoid.[23]

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22 Presumably, the utilities would argue that there was no need to compel utilities to interconnect in order to sell to qualifying facilities and therefore Congress never considered the issue. But the legislative history belies that assertion. *See*, *FERC* v. *Mississippi*, *supra*, 102 S. Ct. at 2132, "traditional electricity utilities were reluctant to . . . sell power to, the nontraditional facilities."

23 If safety and reliability are concerns of the utilities, it takes little ingenuity to generate a factual dispute on a material issue requiring full-scale adjudicatory hearings under FPA Section 210. Thus, EEI's attempt (EEI Br., p. 17) to denigrate the concern expressed in our principal brief, that absent the interconnection rule, utilities will continue to impede development of this program, is wide of the mark.

EEI also claims that state regulatory commissions are under no mandate to protect utility systems' safety and reliability. It asserts that fewer than half of the authorities have addressed those concerns when implementing the rules. (EEI Br., p. 15.) This is disingenuous. EEI quotes a portion of the FERC rule authorizing state regulatory authorities to establish reasonable standards to assure system safety and reliability, but neglects to point out that the rule provides that those standards "may be recommended by any electric utility, any qualifying facility, or any other person." 18 C.F.R. § 292.308. To the extent state commissions have not "chosen to address these concerns," as EEI puts it (EEI Br., p. 15), the utilities obviously have not chosen to recommend any particular standards.

Indeed, respondents concede that the technical issues involved in interconnection between utilities and qualifying facilities are "generally less complex than when interconnections among utilities are in dispute." (Res. Br., p. 48 n.66.) The reason is obvious. A qualifying facility seeking to sell its power to a utility transmits that power over the same lines as carry the power the utility sells to it. System safety and reliability are of no greater concern because of the direction in which the current flows.[24]

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24 Cogenerators also have system safety and reliability concerns when interconnected with a utility. A sudden surge from a utility's system into the cogenerator's plant could be far more devastating to the cogenerator than a surge from the cogenerator into the utility's system would be to the utility.

CONCLUSION

For the foregoing reasons, and the reasons stated in our principal brief, the decision of the Court of Appeals should be reversed and the FERC rules upheld.

Respectfully submitted,

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